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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71 - 582

LAURENCE H. FROMMHAGEN, *Petitioner,*

vs.

J. HENRY GLAZER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court
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No.

LAURENCE H. FROMMHAGEN, *Petitioner,*
vs.
J. HENRY GLAZER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Laurence H. Frommhagen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 27, 1971. A timely petition for a rehearing was denied on June 8, 1971, to be made effective June 15, 1971.

OPINIONS BELOW

No opinion of the District Court for the Northern District of California was rendered.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 441 F. 2d 338 (1971), and a copy thereof is attached as the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1971, and an order denying a petition for rehearing was entered on June 8, 1971, to be made effective on June 15, 1971. This Petition was not filed within ninety days of said dates by reason of intentional default on the part of petitioner's then attorney. By Orders dated September 27, 1971, and October 14, 1971, the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, granted extensions of time in which to file this petition until October 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the question whether the chief counsel of the NASA-Ames Research Center was acting within the outer perimeter of his duties when he sent copies of a defamatory letter directed to an Ames employee to various NASA officers when the employee was not in the chief counsel's line of supervision raise a triable issue precluding the granting of summary judgment?

2. Is a communication from the chief counsel of the NASA-Ames Research Center directed to a fellow employee of Ames complaining about alleged defamation, a personal grievance, which would be subject only to a qualified privilege that could be defeated by a showing of malice?

3. When a governmental official must establish (a) that his conduct in sending a defamatory com-

munication was within the outer perimeter of his duties and/or (b) that the defamatory communication was not actuated by malice, can summary judgment be granted upon mere conclusory allegations in affidavits that the official was acting in the scope of his official duties?

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment and opinion of the Court of Appeals, which affirmed the granting of summary judgment against the petitioner.

This is an action for damages for libel which originally was filed in the Superior Court of the State of California for the County of Santa Clara and was removed to the District Court for the Northern District of California by respondent. Petitioner was a research scientist at Ames Research Center, National Aeronautics and Space Administration (NASA); Respondent was Chief Counsel at that installation. Petitioner, as conceded in the opinion by the Court of Appeals, was not in respondent's line of supervision.

During January 1968, hearings were held in a grievance proceeding on charges filed by petitioner against respondent and four other officials at Ames Research Center. On March 22, 1968, petitioner sent a letter to the General Council of NASA in Washington, D.C., in which he asked for advice on what to do

about respondent's actions with respect to the grievance action. On March 28, 1968, respondent sent petitioner a memorandum demanding a retraction of statements made in petitioner's March 22, 1968 letter to the General Counsel. Petitioner, in a March 29, 1968, memorandum, refused to acknowledge that he had accused respondent of perjury. On April 1, 1971, respondent responded with a document in which he stated in part:

> You were given an opportunity—more in the nature of a 'sporting chance'—to retract your libelous statements, but I can only gather from the responses in your memorandum of 29 March that *you are either too arrogant or too stupid* to really understand what you have done. . . .
>
> Hopefully you will spare me from further memoranda even though *they have been a source of unbridled enjoyment in my office.* But in the face of the Vietnam War, the attack upon the dollar, the riots in the cities, and the NASA budget cuts, *it is simply immoral,* in this time of crises, Dr. Frommhagen, for any civil servant *to sit idly at his desk and unduly amuse himself by unraveling the leitmotif surrounding a certain ego-centered hero who appears, and reappears, in your writings.* I am truly sorry for you.... (Emphasis added)

A copy of this letter was sent to the Chief of the Personnel Division of the NASA installation and blind copies were sent to three other NASA officials. Petitioner's action for libel was based on the excerpted portion set forth above of respondent's communication to petitioner of April 1, 1968.

On April 10, 1968, respondent in a lengthy memorandum to the Chief of the Personnel Division, formally invoked the federal grievance procedure against petitioner, but declined some weeks later to pursue this grievance.

The Director of Ames Research Center, in a memorandum to petitioner dated May 15, 1968, stated:

> Ames management was not involved with authorizing or sanctioning [respondent's] letter to you dated April 1. This is [respondent's] prerogative. . . .

The district judge found that respondent acted under color of federal office in writing and circulating the letter and was therefore immune from personal liability. The Court of Appeals for the Ninth Circuit affirmed on the authority of *Barr v. Matteo,* 360 U.S. 564 (1959) and stated in its opinion that the instant case was stronger than *Barr v. Matteo, supra,* in that the publication here was limited to four officials of NASA.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT

During the past decade, few, if any, established citadels of the law have been subjected to more persistent and successful onslaught than the doctrine of sovereign immunity. See e.g., *Muskopf v. Corning Hosp. Dist.,* 55 C. 2d 211, 11 Cal. Rptr. 89 (1961). Thus, in determining the proper application of the decision of this Court in *Barr v. Matteo,* 360 U.S.

564 (1959), this Court should consider the tendency on the part of various courts throughout the country to increase the liability of governmental agencies and officials for their tortious conduct.

It is submitted that the decision of the Court of Appeals in affirming the granting of summary judgment in this case does not conform with a proper reading of the *Barr* decision. In *Barr* this Court concluded that defamation is privileged only if the "action . . . taken was within the outer perimeter of [the governmental official's] line of duty . . . ." *Barr v. Matteo,* 360 U.S. 564, 575 (1959). For as elsewhere stated by this Court in its opinion, relying upon the language of Judge Learned Hand in *Gregoire v. Biddle,* 177 F. 2d 569, 581 (2d Cir. 1949):

> '[W]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . .'

Both the district judge and the Court of Appeals ruled that the defamatory communication was absolutely privileged because the respondent "acted under color of federal office in writing and circulating the memorandum."

It is submitted that there can be a material distinction between conduct "within the outer perimeter of [a governmental official's] line of duty" and conduct "under color of federal office," and that conduct under color of office may be outside the outer perimeter of duty.

The phrase "color of office" has a defined meaning broader than and different from the scope of official powers. In *Willingham v. Morgan,* 395 U.S. 402, 405 (1969), this Court concluded that the phrase "color of office" for the purposes of removal under 28 U.S.C. §1442(a)(1) was broader than the test for official immunity. And on remand the Court of Appeals for the Tenth Circuit in *Morgan v. Willingham,* 424 F. 2d 200 (10th Cir. 1970) reversed the granting of summary judgment for the governmental officials because they had not shown by detailed affidavits that they were acting within the scope of their powers—the test for the application of the official immunity doctrine.

Thus, since the Court of Appeals applied the wrong test in this case, this Court should grant certiorari to correct the error and more clearly define the test to be applied in determining the privilege of defamation in official conduct cases.

II. THE DECISION BELOW CONFLICTS WITH THE ANALYSIS IN A DECISION OF THE COURT OF CLAIMS

It is submitted that there is at least a triable question of fact whether the April 1, 1968, document containing the defamatory matter was a personal communication, as petitioner contends, or the initiation of a grievance under NASA procedures, as the respondent, at times, contends. For in notifying petitioner that ". . . Ames management was not involved with authorizing or sanctioning [respondent's] letter

to [petitioner] dated April 1. This is [respondent's] prerogative."—H. Julian Allen, the Director of the NASA-Ames Research Center, raises at least a factual question whether the defamatory communication was a personal and not official document.

Even assuming, *arguendo,* that the document was a grievance petition, under the analysis of the Court of Claims in *Swaaley v. United States,* 376 F. 2d 857 (Ct. Claims 1967) the grievance petition, being an intra-agency petition that may be brought as a privilege of a governmental employee, and not as part of his official duty, would be subject only to a qualified privilege which could be defeated by a show of malice.

Although *Swaaley* was cited to the Court of Appeals, the Court ignored it in its decision. Yet, the analysis in *Swaaley,* though on a different issue, clearly conflicts with the analysis of the Court of Appeals here. Certainly, in the light of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), this Court should determine specifically whether a federal employee is to be entitled to a broader privilege in defamation cases than newspapers.

Thus, since the issue of malice is involved, this Court should not countenance the denial of cross-examination through the granting of summary judgment, see *Santos v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 628-29 (1944), and should rule that summary judgment is inappropriate since intent and motive are critical. Cf. *White Motor Co. v. United States,* 372 U.S. 253, 259-60 (1963); *Pollier v. Columbia Broadcasting System,* 368 U.S. 464 (1962).

III. THE DECISION BELOW CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS

The courts below apparently granted summary judgment primarily on the basis of the essentially conclusory affidavit of John F. Parsons, Associate Director of Ames, which could well have been punctured, had petitioner been afforded the right of cross-examination or pre-trial discovery. Yet, in *Morgan v. Willingham,* 424 F.2d 200 (10th Cir. 1970) the Court held that conclusory affidavits that the governmental officials were performing their official duties were insufficient to satisfy the requirements of Rule 56, Federal Rules of Civil Procedure.

It is submitted that this Court should establish the requirements for factual allegations in affidavits in support of motions for summary judgment in official immunity cases.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, San Francisco, California,
October 22, 1971.

Respectfully submitted,
DAVID B. GOLD,
HERBERT W. YANOWITZ,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 23,536

Laurence Frommhagen,
Plaintiff-Appellant,
vs.
Henry Glazer, et al.,
Defendants-Appellees.

[April 27, 1971]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, DUNIWAY and ELY, Circuit Judges

DUNIWAY, Circuit Judge:

In this libel action, removed to the district court under 28 U.S.C. §§ 1441(a), 1442(a)(1), plaintiff Frommhagen appeals from a summary judgment against him. We affirm.

The affidavits and exhibits on file reveal the following uncontradicted facts.

Frommhagen and Glazer were employed by the National Aeronautics and Space Administration (NASA), an agency of the United States Government, Glazer as Chief Counsel of the Ames Research Center (Ames) of NASA, at Moffett Field, California, and Frommhagen as a scientist at Ames. Frommhagen was not in Glazer's line of supervision.

Pursuant to the Civil Service Commission's *Federal Personnel Manual,* Chap. 771, Subchap. 1 (Inst. 92, July 21, 1967), and the NASA Supplement to that *Manual,* Ames established a grievance procedure for its employees. Ames Management Manual, AMM 3771-1 (May 17, 1965). During January 1968 hearings were held under that procedure on grievances filed by Frommhagen against Glazer and four other senior officials of Ames. Glazer testified under oath at the hearings. On March 22, 1968, Frommhagen sent a letter to Paul Dembling, General Counsel of NASA, in Washington, D.C., in which Frommhagen commented adversely upon Glazer's actions with respect to the grievance proceedings. Glazer read that letter as accusing him of perjury and therefore as defamatory, and on March 28, 1968, he sent Frommhagen an inter-office memorandum demanding a retraction. In a return memorandum sent the following day, Frommhagen declined to retract. Frommhagen sent copies of his memorandum to three NASA officials senior to Glazer, including Dembling.

On April 1, 1968, Glazer responded with the following memorandum:

"NASA-Ames
Moffett Field, California
April 1, 1968

MEMORANDUM to Dr. Laurence H. Fromm-
hagen
Senior Scientist
Life Detection Systems
Branch

From: Mr. J. Henry Glazer
Chief Counsel

Subject: Defamation

You have libeled me before the General Counsel of NASA, the ARC Associate Director, the ARC Assistant Director for Administration and possibly others as a result of the reckless statements made in your memoranda of March 22nd and March 29th. You were given an opportunity—more in the nature of a 'sporting chance'—to retract your libelous statements, but I can only gather from the responses in your memorandum of 29 March that you are either too arrogant or too stupid to really understand what you have done. By copy of this memorandum (with attachments) to the Chief of the ARC Personnel Division I am formally charging you with libeling me before senior NASA officials, and registering a request that appropriate disciplinary action be taken against you consonant with agency procedures.

Hopefully you will spare me from further memoranda even though they have been a source of unbridled enjoyment in my office. But in the face of the Vietnam War, the attack upon the

> dollar, the riots in the cities, and the NASA budget cuts, it is simply immoral, in this time of crises Dr. Frommhagen, for any civil servant to sit idly at his desk and unduly amuse himself by unraveling the leitmotif surrounding a certain ego-centered hero who appears, and re-appears, in your writings. I am truly sorry for you and sorry that, *after much provocation,* you have forced me to institute disciplinary proceedings against you.
>
> JHG:caw"

A copy was sent to Miss M. Helen Davies, Chief of the Ames Personnel Division. Blind copies were sent to the recipients of Frommhagen's earlier memoranda (including Dembling). No other persons received copies. It is immaterial whether this be considered an inter-office memorandum or, as Frommhagen argues, a "personal letter."

On April 10, 1968, Glazer sent a lengthy memorandum to Miss Davies formally invoking the Ames grievance procedure against Frommhagen. A NASA Regulation, entitled "Table of Disciplinary Offenses and Penalties for Employees in the National Aeronautics & Space Administration," provides penalties for numerous offenses, including: "14. Making false or unfounded statements which are slanderous or defamatory about other employees or officials."

Frommhagen's action for libel was based entirely upon Glazer's memorandum of April 1, 1968. In an affidavit, John F. Parsons, Associate Director of Ames and immediate supervisor of Glazer, stated:

"That incident to the performance of his duties as Chief Counsel of the NASA-Ames Research Center, [Glazer] was acting wholly within the scope of his federal employment, and fully within the exercise of his prerogatives, to send or cause to be sent the said April 1st inter-office memorandum to [Frommhagen] and to circulate copies of the same, on federal premises, to [me] and to those NASA officials [to whom he sent copies] as well as to any other NASA official.

"That notwithstanding the federal office which he holds as Chief Counsel of the NASA-Ames Research Center, [Glazer] merely by virtue of federal employment with NASA was authorized to send or cause to be sent without recourse to, or approval from, any NASA official the April 1st inter-office memorandum under the circumstances described since the same constitutes a request, or petition, to the management of the NASA-Ames Research Center to institute agency disciplinary action against [Frommhagen] for alleged misconduct in libeling [Glazer] in official communications with principal officers of NASA, and that any employee of the NASA-Ames Research Center may so petition the management of the Center."

The district judge found that Glazer acted under color of federal office in writing and circulating the memorandum, and that Glazer was therefore immune from personal liability for those acts. In this, the court was right. *Barr v. Matteo,* 1959, 360 U.S. 564. The principal significant difference between this case and *Barr v. Matteo* is that there the alleged libel was

in an agency press release, whereas here Glazer's memorandum was sent only to persons within the agency, and each of them was a person to whom it was proper for him to send it. Thus this is a stronger case for immunity than *Barr v. Matteo.* See dissenting opinion of Chief Justice Warren, 360 U.S. at 583-84. See also *Howard v. Lyons,* 1959, 360 U.S. 593. *See Preble v. Johnson,* 10 Cir., 1960, 275 F.2d 275, 277-79; *cf. West v. Garrett,* 5 Cir., 1968, 392 F.2d 543, 544.

Affirmed.

In the United States District Court
for the Northern District of California

Civil Action No. 49328

Laurence H. Frommhagen,
Plaintiff,

v.

J. Henry Glazer and First Doe
to Tenth Doe, inclusive,
Defendants.

ORDER AND SUMMARY JUDGMENT

This cause having regularly come on for hearing before the Court on the motion of the defendant, J. Henry Glazer, for summary judgment in his favor and against the plaintiff in this cause; and

Due notice having been given to the attorneys for the plaintiff, and the Court being fully advised in the premises, and the matter having been submitted to the Court for decision; and

The Court having considered the motion, reasons and authorities, supporting affidavits, and having found that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law,

It is hereby ordered that:

1. The motion of the defendant, J. Henry Glazer, be and it is hereby granted for the reasons stated therein; and

2. Summary judgment in favor of the defendant, J. Hanry Glazer, against the plaintiff, Laurence H. Frommhagen, be and it is granted and shall be entered accordingly.

Dated: Sept. 9, 1968.

Lloyd H. Burke,
United States District Judge

Filed September 9, 1968,
James P. Welsh, Clerk.

In the United States District Court
for the Northern District of California

Civil Action No. 49328

Laurence H. Frommhagen, Plaintiff,
v.
J. Henry Glazer and First Doe to Tenth Doe, inclusive, Defendants.

JUDGMENT

This cause came regularly on for hearing before the Court on September 9, 1968, upon the motion of the defendant, J. Henry Glazer, for Summary Judgment; the Honorable Lloyd H. Burke, Judge presiding. The cause was argued by Bryan Jones of Jones, Leinwohl and Burriss, attorneys for the plaintiff, Laurence H. Frommhagen, and by Sheldon Deutsch, Assistant United States Attorney, for Cecil F. Poole, United States Attorney and submitted to the Court for its decision. The Court granted the motion of the defendant, J. Henry Glazer, and dismissed the action as to him, and ordered Summary Judgment in his favor against the plaintiff, which order of September 9, 1968, is made a part hereof.

It is hereby ordered, adjudged and decreed that the plaintiff take nothing by his alleged cause of action

and that Judgment be entered for the defendant, J. Henry Glazer, and against the plaintiff.

Dated this 11th day of Oct., 1968.

Lloyd H. Burke
United States District Judge

Approved as to form:
Jones, Leinwohl, & Burriss
By: Bryan Jones
Attorneys for Plaintiff

Filed October 14, 1968,
James P. Welsh, Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-582

LAURENCE H. FROMMHAGEN, PETITIONER

v.

J. HENRY GLAZER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner Frommhagen, a scientist employed by the National Aeronautics and Space Administration ("NASA") at the Ames Research Center (Moffett Field, California), brought this libel action in a California state court against respondent J. Henry Glazer, Chief Counsel at Ames. The cause was removed to the United States District Court for the Northern District of California pursuant to 28 U.S.C. 1442(a).

The district court, finding that the case raised no genuine issues of material fact, granted respondent's

motion for summary judgment (Pet. App. vii). The court of appeals affirmed, holding that respondent's action was privileged under *Barr* v. *Matteo*, 360 U.S. 564 (Pet. App. i-vi). Petitioner's request for a rehearing *en banc* was denied (Pet. 2).

The facts may be summarized as follows:

Petitioner, utilizing pre-established agency procedures, filed grievances against respondent and several other Ames officials (Pet. App. ii). The grievances were submitted to an independent arbitrator who received documentary evidence and took testimony, under oath, from respondent and the other parties. After completion of the grievance hearing, but before the arbitrator entered findings and recommendations, petitioner renewed his charges against respondent in a letter to the NASA General Counsel in Washington, D. C. In this letter, petitioner also disputed the sworn testimony respondent had given at the grievance hearing and, in general, commented adversely upon the Chief Counsel's conduct during the grievance proceedings (*ibid.*).

Upon receiving a copy of the letter, respondent sent a memorandum to petitioner demanding a retraction. When petitioner declined to retract his statements, respondent wrote the memorandum of April 1, 1968, which is the basis of this suit. (For complete text see Pet. App. iii-iv). The memorandum was sent to petitioner with copies to the Chief of the Ames Personnel Division and two other supervisory officials (*ibid.*). It set forth respondent's belief that he had been libeled and that petitioner's failure to re-

tract the statements was the result of either arrogance or stupidity (Pet. App. iii). Respondent also stated that

> [b]y copy of this memorandum (with attachments) to the Chief of ARC Personnel Division I am formally charging you with libeling me before senior NASA officials, and registering a request that appropriate disciplinary action be taken against you consonant with agency procedures.[1]

Respondent filed in the district court an affidavit of Ames' Associate Director, which stated that (Pet. App. v)

> notwithstanding the federal office which he holds as Chief Counsel of the NASA-Ames Research Center, [respondent] merely by virtue of federal employment with NASA was authorized to send or cause to be sent without recourse to, or approval from, any NASA official the April 1st inter-office memorandum under the circumstances described since the same constitutes a request, or petition, to the management of the NASA-Ames Research Center to institute agency disciplinary action against [Frommhagen] for alleged misconduct in libeling [respondent] in official communications with principal officers of NASA, and that any employee of the NASA-Ames Research Center may so petition the management of the Center.

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[1] A short time later, respondent submitted another memorandum to the Personnel Division which set forth, in more detail, his reasons for requesting that disciplinary action be taken (Pet. App. iv).

The courts below correctly held that respondent's action was within the scope of his official duties and therefore immune from suit under *Barr* v. *Matteo*, 360 U. S. 564.[2] It is settled that federal employees have the right, and, in some circumstances the duty, to apprise officials of unsatisfactory behavior by coworkers. See, *e.g. Preble* v. *Johnson*, 275 F.2d 275, 277-279 (C.A. 10); *West* v. *Garrett*, 392 F.2d 543, 544 (C.A. 5); *Keiser* v. *Hartman*, 339 F. 2d 597 (C.A. 3), certiorari denied, 381 U. S. 934. The memorandum did this and requested that formal disciplinary action be taken against petitioner. Having before them the text of the memorandum and the affidavits the district court and court of appeals properly found that there was no genuine issue of material fact to be resolved by a trial on the merits[3] and cor-

---

[2] As the court of appeals noted:

> The principal significant difference between this case and *Barr* v. *Matteo* is that there the alleged libel was in an agency press release, whereas here Glazer's memorandum was sent only to persons within the agency, and each of them was a person to whom it was proper for him to send it. Thus this is a stronger case for immunity than *Barr* v. *Matteo*. See dissenting opinion of Chief Justice Warren, 360 U.S. at 583-84. • • • [Pet. App. v-vi.]

[3] Petitioner contends that respondent's grievance petition is "subject only to a qualified privilege which could be defeated by a show of malice" (Pet. 8). Official immunity attaches, however, when action is taken in the line of duty, without regard to whether that action was voluntary or obligatory. See, *e.g.*, *Barr* v. *Matteo*, *supra*; *Howard* v. *Lyons*, 360 U.S. 593; *Denman* v. *White*, 316 F. 2d 524 (C.A. 1). Nor can immunity be defeated by an allegation of malice. See,

rectly held that respondent "acted under color of federal office in writing and circulating the memorandum, and that [he] was therefore immune from personal liability for those acts" (Pet. App. v). *Barr* v. *Matteo*, *supra*, at 575. There is no novel point of law raised nor any conflict with decisions of this Court or the courts of appeal that would merit review by this Court.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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e.g., *Barr* v. *Matteo*, *supra*, at 568; *Chafin* v. *Pratt*, 358 F. 2d 349, 353 (C.A. 5), certiorari denied, 385 U.S. 878.

[4] Petitioner's reliance (Pet. 9) upon *Morgan* v. *Willingham*, 424 F. 2d 200 (C.A. 10), is misplaced. The record indicates that respondent did not rely upon "conclusory affidavits" to establish that he was acting within the scope of his official duties. See, *e.g.*, the affidavit of Ames' Associate Director, which is set forth in the court of appeals' opinion at Pet. App. v.

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OCTOBER TERM, 1971

No. 71-582

LAURENCE H. FROMMHAGEN, *Petitioner,*

vs.

J. HENRY GLAZER, *Respondent.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
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OCTOBER TERM, 1971

No. 71-582

LAURENCE H. FROMMHAGEN, *Petitioner,*

vs.

J. HENRY GLAZER, *Respondent.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Laurence H. Frommhagen, respectfully files a supplemental brief in support of his petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the grounds that because of his difficulties with his previous counsel, petitioner's present counsel did not have complete access to all of the records in this case. As a result, certain matters in the petition for writ of certiorari were not stated with complete accuracy and others were not included in the appendix.

JURISDICTION

In the Petition for Writ of Certiorari it was asserted that

the order of the Court of Appeals denying a petition for rehearing was entered on June 8, 1971, to be made effective on June 15, 1971. The latter statement was based upon a written communication received by petitioner from the Clerk of the U.S. Court of Appeals for the Ninth Circuit. That communication together with the court's order as well as all other records in the case were transmitted by petitioner in August of 1971 to Byron N. Scott, Esq., petitioner's previous counsel in this proceeding, who has refused to return these documents to petitioner. Petitioner's present counsel was unable to obtain the original file from said clerk before the Petition for Writ of Certiorari was filed and said clerk now states that a copy of the original communication is no longer available.

The Petition for Writ of Certiorari was not filed within ninety days after the date of the Court's order, dated June 8, 1971, because said Byron N. Scott, who had been retained by petitioner to represent petitioner in this action, represented to petitioner that the ninety days period did not begin to run until June 15, 1971.

Petitioner's counsel did not have any of the records which would have enabled his to discover the error. The said Byron N. Scott further represented to petitioner and to petitioner's present counsel that he, Scott, would file the petition on behalf of petitioner, but despite these represent ations, filed a rough draft of a petition marked 'pro se' with petitioner on September 6, 1971, the last day of the filing period. These actions and inactions on the part of the said Byron N. Scott prevented petitioner from filing a timely petition for writ of certiorari or obtaining an extension of time in which to file the petition before the ninety day period had elapsed.

By orders signed on September 27, 1971, and October 14, 1971 by the honorable WILLIAM O. DOUGLAS, Associate Justice of the United States Supreme Court, extensions of time in which to file the petition were granted without prejudice as to the Court's consideration of whether the petition was filed in time.

Petitioner has filed a grievance with the Committee on Admissions and Grievances of the United States District Court of the District of Columbia as well as a complaint in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, as to the failure of Byron N. Scott, Esq., to represent the petitioner and to file the petition for writ of certiorari within the ninety day limit. Both of these actions are now pending.

Dated, San Francisco, California,
November 23, 1971.
Respectfully submitted,

DAVID B. GOLD
HERBERT W. YANOWITZ,
Attorneys for Petitioner

Supplemental Appendix

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71 - 582

LAURENCE H. FROMMHAGEN, Petitioner

vs.

J. HENRY GLAZER, Respondent

The petitioner, LAURENCE H. FROMMHAGEN, being duly sworn according to law, deposes and says:

1. He is the petitioner in the above-entitled matter.

2. On November 12, 1971, he transmitted to the Committee on Admissions and Grievances of the United States District Court for the District of Columbia, a grievance wherein he alleges: (1) his previous attorney, Byron N. Scott, Esq., who had accepted a retainer from petitioner to represent petitioner in this action before the United States Supreme Court and who had repeatedly assured petitioner during the summer of 1971 that he would represent petitioner and would file a petition for writ of certiorari, informed petitioner on September 6, 1971, that he would not represent petitioner and would not file said petition, (2) the said Byron N. Scott misinformed petitioner as to when the ninety day period for filing said petition would begin to run, i.e., on June 15, 1971, and (3) the said Byron N. Scott has refused to

return to petitioner, for use by petitioner's present attorney, the records of the action in the courts below even though petitioner was represented by other attorneys in those matters.

Petitioner also filed on October 12, 1971, a complaint in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, wherein he prays for return of the fees, including the retainer, he paid to the said Byron N. Scott.

Both of those complaints are now pending. The trial in the Small Claims and Conciliation Branch has been set for February 21, 1972, over the protestations of petitioner who had asked for a much earlier hearing.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CRUZ)

Subscribed and sworn to before me this 23rd day of November, 1971.

(his seal) /s/ John E. Nohrden
JOHN E. HOHRDEN

Notary Public In and For Said County and State

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAURENCE FROMMHAGEN,

Plaintiff-Appellant,

vs.

HENRY GLAZER, et al,

Defendants-Appellees.

Before: HAMLEY, DUNIWAY, and ELY,
Circuit Judges

ORDER

The petition for a rehearing is denied. Pursuant to Rule Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion of a rehearing in banc has been transmitted to all of the judges of the court who are in regular active service, but no member of the court has requested a vote on such suggestion. The suggestion of a rehearing in banc is rejected.

FILED

JUN 8 1971

WM. B. LUCK, CLERK

LAURENCE H. FROMMHAGEN
Pro Se
P.O. Box 326
Soquel, California 95073

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

LAURENCE H. FROMMHAGEN, Petitioner
v.
J. HENRY GLAZER, Respondent

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable WILLIAM O. DOUGLAS, Associate Justice of the Supreme Court of the United States:

LAURENCE H. FROMMHAGEN, being duly sworn, according to law, deposes and says:

1. He is the petitioner in the above-entitled matter and is making this affidavit in support of his application for an extension of time within which to file a petition for writ of certiorari.

2. On April 27, 1971, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming the judgment of the United States District Court for the Northern District of California which entered judgment against the petitioner. A copy of the opinion of the United States Court of Appeals is appended hereto as Exhibit A. A petition for rehearing was denied on June 8, 1971, to be made effective June 15, 1971.

3. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C., Section 1254(1).

4. Petitioner, a former research scientist at Ames Research Center, NASA, Moffett Field, California, filed a complaint against J. Henry Glazer, Chief Counsel at Ames Research Center, NASA, the respondent herein, alleging that respondent defamed the petitioner through a written communication to petitioner dated April 1, 1968, copies of which were disseminated in a blind fashion to various persons. The communication charged petitioner, among other charges, with being arrogant or stupid and further characterized petitioner as appearing through his writings as an "ego-centered hero". Petitioner contends that the communication was actuated by malice and was on its face a personal grievance which did not allege any impairment of agency efficiency. Summary judgment was entered for the respondent in the trial court on the ground that, as a matter of law, the respondent was immune from personal liability under the decision of this Court in *Barr v. Matteo*, 360 U.S. 564 (1959).

Petitioner contends that this is appropriate for certiorari on the following grounds:

(1) The Court of Appeals for the Ninth Circuit has decided an important question of law which has not been ruled upon directly by this Court, and should be, and has decided a federal question in a way which does not conform to the decisions of this Court in *Barr* v. *Matteo, supra.*, and *Howard v. Lyons*, 360 U.S. 593 (1959). Both of these cases left the question, which is becoming increasingly troublesome, as to how a court is to determine whether a defendant was acting within the outer perimeter of his official duties without taking some testimony to probe that question. In the instant matter the Courts below have denied petitioner the opportunity, guaranteed to him under due process of law, to

adduce testimony which would have established the non-official, malicious intent of respondent in disseminating his libelous matter to a wider audience than he has admitted. Therefore, the summary judgment entered in behalf of the respondent was inappropriate and improper.

(2) The Court of Appeals for the Ninth Circuit failed to recognize that personal grievances unrelated to the efficiency of the federal service, such as the respondent's letter to petitioner of April 1, 1968, are governed not by *Barr v. Matteo supra.*, but rather by the decision of this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), by the decision of the United States Court of Appeals for the District of Columbia in *Meehan v. Macy*, 392 F. 2d 822 (1968), and by the United States Court of Claims in *Swaley v. United States*, 376 F. 2d 857 (1967). The latter line of cases, which follow from the decision of this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), hold that a personal grievance enjoys only a qualified privilege which can be defeated by a showing of malice.

5, Petitioner has had but limited legal experience and believes that if his cause before this Court is to be successful he must be represented by competent counsel.

6. Petitioner requests an extension of time because, although he retained the Honorable Byron N. Scott, Washington, D.C. for the purpose of representing him in this Action, and although the said Byron N. Scott repeatedly assured petitioner that he would represent petitioner and would file the Petition for Writ of Certiorari, the said Byron N. Scott suddenly and inexplicably informed petitioner on September 6, 1971,that he would not represent petitioner and would not file said petition. All that petitioner has received from Byron N. Scott is a rough draft of the proposed petition in the form of a *pro se* petition transmitted by Byron N. Scott on September 3, 1971, and claimed by petitioner from his post

box on September 6, 1971. Petitioner had communicated his uneasiness as to the fast-approaching expiration of the time limit for filing of said petition to Herbert W. Yanowitz, Esq. (whose affidavit is appended hereto as Exhibit B) on September 1, 1971.

7. Petitioner has communicated with an attorney in San Francisco, California, who has agreed to represent petitioner and file a petition for a writ of certiorari in an extension of time granted by this Court. Said counsel has indicated that the rough draft of the petition transmitted to petitioner by Byron N. Scott is inadequate, that further matters should be alleged in the petition, and that the filing of the petition would not be frivolous.

8. Petitioner accordingly needs an extension of time to and including September 30, 1971, within which to have the said petition filed.

WHEREFORE, your affiant respectfully prays that this Court enter an order extending the time within which the affiant may file a petition for writ of certiorari from the decision of the United States Court of Appeals for the Ninth Circuit to and including September 30, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

Dated: September 9, 1971

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CRUZ)

Subscribed and sworn to before me this ninth day of September, 1971.

/s/ Eva Busch
Notary Public in and for said County
(her seal) and State

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he transmitted by mail a fully conformed copy of the foregoing APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI to the United States Attorney, 450 Golden Gate Avenue, San Francisco, California, on September 9, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

EXHIBIT A

SEE APPENDIX TO PETITION FOR WRIT OF CERTIORARI

EXHIBIT B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

LAURENCE H. FROMMHAGEN, Petitioner

v.

J. HENRY GLAZER, Respondent

HERBERT W. YANOWITZ, being duly sworn according to law, deposes and says:

1. He is an attorney at law with offices in San Francisco, California.

2. Late in the afternoon of September 1, 1971, affiant was called by Laurence H. Frommhagen (hereinafter called "Frommhagen"), the petitioner herein, who advised affiant that Frommhagen had retained the Honorable Byron N. Scott (hereinafter called "Scott") to represent Frommhagen in filing a petition for a writ of certiorari with this court, but that Frommhagen was concerned about not having heard from Scott or having received a copy of the filed petition.

3. At the request of Frommhagen, on September 2, 1971, affiant telephoned Scott and asked whether Scott would file the petition on behalf of Frommhagen. At no time during the said conversation did Scott indicate in any manner that Scott did not intend to represent Frommhagen before this Court.

/s/ Herbert W. Yanowitz
HERBERT W. YANOWITZ
Suite 1100, 105 Montgomery Street
San Francisco, California 94104

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN FRANCISCO)

Subscribed and sworn to before me this eighth day of September, 1971.

/s/ Jaqueline S. Montoliu
Notary Public in and for said County and State

(her seal)

SUPREME COURT OF THE UNITED STATES

No. A-363, October Term, 1971

LAURENCE H. FROMMHAGEN,
Petitioner

v.

J. HENRY GLAZER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Oct 4, 1971, without prejudice to the Court's consideration as to whether the application was filed in time.

/s/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of September, 1971

LAURENCE H. FROMMHAGEN
Pro Se
P.O. Box 326
Soquel, California 95073

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. A-363

LAURENCE H. FROMMHAGEN, Petitioner

v.

J. HENRY GLAZER, Respondent

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable WILLIAM O. DOUGLAS, Associate Justice of the Supreme Court of the United States:

LAURENCE H. FROMMHAGEN, being duly sworn according to law, deposes and says:

1. He is the petitioner in the above-entitled matter and is making this affidavit in support of his application for an extension of time within which to file a petition for writ of certiorari.

2. On September 9, 1971, petitioner transmitted to the Honorable WILLIAM O. DOUGLAS an Application For Extension Of Time To File Petition For Writ Of Certiorari. On

October 3, 1971, petitioner received an Order granting said Application which specified that the Petition For Writ of Certiorari be filed no later than October 4, 1971. In the period between September 9, 1971, and October 3, 1971, petitioner had spoken by telephone with a staff member of the Office of the Honorable WILLIAM O. DOUGLAS on three occasions and had received no assurances, and properly so, that the petitioners' Application would be granted. Petitioner, responding to a sense of hopelessness resulting from his abandonment by his attorney in Washington, D.C., and the lack of any response to his Application to this Court, informed his attorney during the early part of the week of September 27, 1971, that he, the petitioner, believed that the cause was lost and that no further effort should be expended.

3. Petitioner, heartened by the Order granting his Application, will require, by reason of his attorney's commitments and his own commitments, as additional twenty-four days to complete, have printed, and personally deliver to the Court, his Petition for Writ of Certiorari.

4. Petitioner, who is limited in his financial resources, has not wished to commit a portion of those resources until he received some assurance that his out-of-time petition would at least be considered by the Court. Petitioner is not as much concerned by Respondent's libel as he is with the significant issues which he desires to bring to the attention of this Court, most notably the failure of the Courts below to afford petitioner due process and his 'day in court'.

WHEREFORE, your affiant respectfullt prays the Court, consistent with the sixty day provision of Rule 22(1) of the

rules of the Supreme Court, to enter an Order extending the time within which the petitioner may file the Petition for Writ Of Certiorari from the decision of the United States Court Of Appeals For The Ninth Circuit to, and including, October 27, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

Dated: October 3, 1971.

STATE OF CALIFORNIA)
) ss
COUNTY OF SANTA CRUZ)

Subscribed and sworn to before me this fourth day of October, 1971.

/s/ Hilda C. Burchell
Notary Public

(her seal)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he transmitted by mail fully conformed copies of the foregoing Application For Extension Of Time To File Petition For Writ Of Certiorari and the Order Extending Time To File Petition For Writ Of Certiorari, signed by the Honorable WILLIAM O. DOUGLAS on September 27, 1971, to the United Stated Attorney, 450 Golden Gate Avenue, San Francisco, California, on October 4, 1971.

/s/ Laurence H. Frommhagen
LAURENCE H. FROMMHAGEN

SUPREME COURT OF THE UNITED STATES

No. A-363

LAURENCE H. FROMMHAGEN,
Petitioner

v.

J. HENRY GLAZER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including Oct. 27th, 1971, without prejudice to the Court's consideration as to whether the application was filed in time.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 14th
day of October, 1971.